Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–108–06 OF 2020
MOHAMED ZAINI MAZLAN J
30 MARCH 2021

Criminal Procedure — Prosecution — Prosecuting officer — Accused applied to disqualify private lawyer appointed to head prosecution in series of criminal cases against accused — Public Prosecutor had appointed lawyer as senior deputy public prosecutor ('senior DPP') pursuant to s 376(3) of Criminal Procedure Code — Accused alleged lawyer had not only been involved in investigation process in his cases but had also shown bias by prejudging his guilt — Whether accused's allegations were devoid of evidence — Whether two previous attempts by accused to disqualify lawyer on same grounds ended in failure — Whether accused could not be allowed to abuse process of court by regurgitating same issue ad infinitum

The instant application by the applicant — who was once the Prime Minister of Malaysia — was yet another attempt by him to disqualify a private lawyer ('GSR') from continuing to act as a senior deputy public prosecutor ('senior DPP') in five criminal cases pending against the applicant in the High Court. In August 2018, the then attorney general cum public prosecutor of Malaysia ('TT') had made a public announcement that, pursuant to s 376(3) of the Criminal Procedure Code ('the CPC') he had appointed GSR as the senior DPP to take charge of the prosecution of the applicant and other persons on corruption charges involving the 1Malaysia Development Bhd ('1MDB') group of companies. The disqualification application was based on the grounds that GSR had been involved in the investigation process of the cases against the appliant and also that he had openly displayed bias by prejudging the applicant's guilt. To substantiate the first ground, the applicant had referred to TT's press statement concerning GSR's appointment and also to GSR's letter of appointment in both of which TT had said that GSR's appointment would 'enhance' or 'spearhead' the 'investigation and prosecution' of the principal personalities involved in the 1MDB fraudulent deals, including the applicant. The applicant said this was a clear case of conflict of interest as a prosecutor was not allowed by the CPC or the Federal Constitution to have taken part in the investigation of an accused person. As for the ground of bias, the applicant referred to a meeting that GSR had had with TT's predecessor ('MAA') and a recorded Whatsapp conversation between them in which GSR had sought for the applicant's arrest and prosecution and had also referred to the applicant as 'that criminal'. The applicant submitted that the said conversation proved that GSR had prejudged his guilt and was biased against him even before he was appointed as the senior DPP. As a result, the applicant feared that he might be

A denied of a fair trial. In reply to the grounds raised, the respondent submitted that: (a) the applicant had made two previous attempts to disqualify GSR on the same grounds relied upon in the instant application and both those attempts had failed, with one of them even having been argued up to the Federal Court level; (b) a similar application to disqualify GSR on the same
B grounds by the applicant's lawyer — on a corruption charge that he was facing — had also failed; hence, the regurgitation of the same issue in the instant application was an abuse of process of court; (c) it was far-fetched for the applicant to contend that at the material time when GSR was merely a private legal practitioner, he could have acted on the instructions of a veteran politician
C to ask a sitting attorney general (MAA) to arrest and prosecute a sitting Prime Minister (the applicant); and (d) any views that GSR might have expressed about the applicant in the Whatsapp conversation were merely his personal views as a private individual well before he was appointed as senior DPP for the cases against the applicant.

D

Held, dismissing the application:

(1) The media statements by TT and the contents of GSR's letter of appointment stated that GSR was to be involved in the investigations. It
E was perhaps a poor choice of words and, in hindsight, could have been drafted or said better. What was pertinent was to show that the intent, if at all that was the case, was acted upon. GSR denied that he was involved in the investigation process. There was no reason to doubt his denial as there was no convincing evidence from the applicant to suggest
F otherwise. The applicant had to produce the evidence to substantiate his allegations and not merely hurl accusations based on perceptions. The court therefore found the allegation that GSR was involved in the investigations against the applicant to be unmeritorious. The issue had, in any event, been canvassed by the applicant in his previous applications
G to disqualify GSR. It had been deliberated upon and decided by the other courts and those decisions should remain. The issue was a moot point which should not be regurgitated again (see para 28).

(2) In a previous application by the applicant to disqualify GSR on the same grounds as herein, the Court of Appeal ('COA') had held that the
H statements by TT to the media did not prove that GSR was involved in the investigative process. The COA ruled that while prosecutors did not take part in investigations, they were empowered to direct investigating officers to do further investigations if some matters needed further evidence. The COA held that TT's statement of GSR's involvement in
I the investigation process was merely in a supervisory role accustomed to prosecutors and that the applicant's allegations were bare assertions devoid of evidence. Another High Court took the same view and found the applicant's allegations unsubstantiated. That Court held that GSR could not have been involved in the investigation process as the applicant

was investigated by the Malaysian Anti-Corruption Commission in 2015, whereas GSR was only appointed as senior DPP in August 2018 (see paras 26–27).

(3) The applicant's apprehension of GSR's views and bias was untenable. GSR, like any other person, was entitled to have his personal opinion and it remained just that. It would have been a different consideration if GSR had demonstrated his bias when he was carrying out his duty as senior DPP. His personal opinion did not impinge on his duties as a prosecutor. Like any other person, GSR was entitled to form his own opinion provided his view was not made public, for that would then set forth the test of whether it would lead a fair-minded reasonably-informed person to conclude that the prosecution would be directed at vindicating his personal view. It was perfectly reasonable to hold a personal view. The crucial test was whether he was openly biased when he acted as the senior DPP. The meeting between MAA and GSR and their Whatsapp conversation took place well before GSR was appointed as the senior DPP. It was a private conversation and those were GSR's views then. The applicant's application would have had more force if those events had taken place after GSR's appointment as senior DPP (see paras 35 & 37).

(4) GSR was merely a cog in the wheel as a senior DPP. It would be a great disservice to the Attorney General's Chambers and its officers to suggest that GSR alone had absolute control over the applicant's prosecution and could manipulate the conduct of the prosecution's case to fit his agenda when the prosecution's team consisted of other DPPs and the general conduct of the criminal proceedings was under the purview of the public prosecutor and his officers (see para 38).

(5) It was ultimately for the courts to ensure that the applicant was afforded his constitutional right to a fair trial. The judge held the balance between the parties in dispute and it was the court's bounden duty to ensure that a trial was conducted fairly in the interests of justice (see para 39).

[Bahasa Malaysia summary

Permohonan ini oleh pemohon — yang merupakan mantan Perdana Menteri Malaysia — adalah lagi satu percubaan olehnya untuk membatalkan kelayakan peguam persendirian ('GSR') daripada bertindak sebagai timbalan pendakwa raya kanan ('TPR kanan') dalam lima kes jenayah yang masih belum selesai terhadap pemohon di Mahkamah Tinggi. Pada Ogos 2018, peguam negara yang juga pendakwa raya Malaysia ('TT') pada ketika itu telah membuat pengumuman awam bahawa, menurut s 376(3) Kanun Tatacara Jenayah ('KTJ') dia telah melantik GSR sebagai TPR kanan untuk mengambil alih pendakwaan untuk pemohon dan orang lain berhubung pertuduhan rasuah yang melibatkan kumpulan syarikat 1Malaysia Development Bhd ('1MDB'). Permohonan pelucutan kelayakan itu adalah berdasarkan alasan bahawa GSR

terlibat dalam proses siasatan kes terhadap pemohon dan juga bahawa dia telah secara terbuka menunjukkan sikap berat sebelah dengan berprasangka buruk terhadap kesalahan pemohon. ntuk membuktikan alasan pertama, pemohon telah merujuk kepada pernyataan akhbar TT mengenai pelantikan GSR dan juga surat pelantikan GSR yang mana kedua-duanya telah TT mengatakan bahawa pelantikan GSR akan 'enhance' atau 'spearhead' untuk 'investigation and prosecution' keperibadian utama yang terlibat dalam urus niaga palsu 1MDB, termasuk pemohon. Pemohon mengatakan bahawa ini adalah kes konflik kepentingan yang jelas kerana pendakwa raya tidak dibenarkan oleh KTJ atau Perlembagaan Persekutuan untuk mengambil bahagian dalam penyiasatan seseorang yang dituduh. Berhubung alasan berat sebelah, pemohon merujuk kepada mesyuarat yang telah diadakan antara GSR dengan pendahulu TT ('MAA') dan perbualan Whatsapp yang dirakam di antara mereka di mana GSR telah meminta tangkapan dan pendakwaan pemohon dan juga merujuk kepada pemohon sebagai 'that criminal'. Pemohon berhujah bahawa perbualan tersebut membuktikan bahawa GSR telah berprasanga buruk dengan kesalahannya dan berat sebelah terhadapnya malah sebelum dia dilantik sebagai TPR kanan lagi. Akibatnya, pemohon khuatir yang dia mungkin dinafikan perbicaraan yang adil, dalam jawapan terhadap alasan-alasan yang ditimbulkan, responden berhujah bahaw: (a) pemohon telah membuat dua percubaan terdahulu untuk melucutkan kelayakan GSR dengan bergantung pada alasan sama dalam permohonan ini dan kedua-dua percubaan tersebut telah gagal, yang mana salah satunya telah dihujahkan sehingga di peringkat Mahkamah Persekutuan; (b) permohonan sama untuk melucutkan kelayakan GSR atas alasan sama oleh peguam pemohon — atas pertuduhan rasuah yang dihadapinya — juga telah gagal; justeru, regurgitasi isu yang sama dalam permohonan ini adalah penyalahgunaan proses pengadilan; (c) adalah tidak masuk akal bagi pemohon untuk berpendapat bahawa pada masa matan ketika GSR hanyalah pengamal undang-undang persendirian, dia dapat bertindak berdasarkan arahan ahli politik veteran untuk memohon Peguam Negara (MAA) ketika itu untuk menangkap dan mendakwa Perdana Menteri ketika itu (pemohon); dan (d) apa-apa pandangan yang mungkin dinyatakan oleh GSR mengenai pemohon dalam perbualan Whatsapp hanyalah pandangan peribadinya sebagai individu persendirian sebelum dia dilantik sebagai TPR kanan untuk kes-kes terhadap pemohon.

Diputuskan, menolak permohonan:

(1) Kenyataan media oleh TT dan kandungan surat pelantikan GSR menyatakan bahawa GSR telah terlibat dalam siasatan. Ia mungkin pilihan kata-kata yang tidak tepat dan, jika dilihat balik, boleh digubal atau dinyatakan dengan lebih baik. Apa yang relevan adalah untuk menunjukkan bahawa niat, jika memang demikian, telah dilaksanakan. GSR menafikan bahawa dia terlibat dalam proses siasatan. Tiada alasan untuk meragui penafiannya kerana tiada keterangan yang meyakinkan

dari pemohon untuk mencadangkan sebaliknya. Pemohon perlu mengemukakan keterangan untuk membuktikan tuduhannya dan tidak hanya melemparkan tuduhan berdasarkan persepsi. Oleh itu, Mahkamah menganggap tuduhan bahawa GSR terlibat dalam siasatan terhadap pemohon adalah tidak bermerit. Bagaimanapun, isu ini telah diteliti oleh pemohon dalam permohonan sebelumnya untuk melucutkan kelayakan GSR. Ia telah dibincang dan diputuskan oleh mahkamah lain dan keputusan tersebut patut kekal. Isu tersebut adalah perkara boleh dihujahkan yang sepatutnya tidak diulangi lagi (lihat perenggan 28).

(2) Dalam permohonan sebelumnya oleh pemohon untuk melucutkan kelayakan GSR atas alasan yang sama seperti di sini, Mahkamah Rayuan ('MR') telah menyatakan bahawa kenyataan oleh TT kepada media tidak membuktikan bahawa GSR terlibat dalam proses siasatan. MR memutuskan bahawa tatkala pendakwa raya tidak mengambil bahagian dalam siasatan, mereka diberi kuasa untuk mengarahkan pegawai penyiasat untuk melakukan sisatan lanjut jika beberapa perkara memerlukan keterangan lanjut. MR memutuskan bahawa kenyataan TT mengenai penglibatan GSR dalam proses siasatan hanyalah dalam peranan penyeliaan yang biasa dilakukan oleh pendakwa raya dan bahawa tuduhan pemohon adalah kenyataan tanpa bukti. Mahkamah Tinggi yang lain mengambil pandangan yang sama dan mendapati tuduhan pemohon tidak berasas. Mahkamah itu memutuskan bahawa GSR tidak mungkin terlibat dalam proses siasatan kerana pemohon disiasat oleh Suruhanjaya Pencegahan Rasuah Malaysia pada tahun 2015, sedangkan GSR hanya dilantik sebagai TPR kanan pada Ogos 2018 (lihat perenggan 26–27).

(3) Pemahaman pemohon terhadap pandangan dan sikap berat sebelah GSR tidak dapat dipertahankan. GSR, seperti orang lain, berhak untuk mempunyai pendapat peribadinya dan tetap seperti itu. Akan menjadi pertimbangan yang berbeza jika GSR menunjukkan sikap berat sebelahnya ketika dia menjalankan tugasnya sebagai TPR kanan. Pendapat peribadinya tidak mengganggu tugasnya sebagai pendakwa raya. Seperti orang lain, GSR berhak untuk membentuk pendapatnya sendiri dengan syarat pandangannya tidak diumumkan, kerana itu kemudian akan menguji apakah ia akan membawa kepada orang yang berfikiran adil dan diberitahu semunasabahnya untuk menyimpulkan bahawa pendakwaan akan diarahkan untuk membenarkan pandangan peribadinya. Adalah wajar untuk mempunyai pandangan peribadi. Ujian penting adalah sama ada dia bersikap berat sebelah secara terbuka ketika bertindak sebagai TPR kanan. Mesyuarat antara MAA dan GSR dan perbualan Whatsapp mereka berlaku sebelum GSR dilantik sebagai TPR kanan. Itu adalah perbualan peribadi dan itulah pandangan GSR ketika itu. Permohonan pemohon mungkin lebih kukuh sekiranya peristiwa

tersebut berlaku setelah pelantikan GSR sebagai TPR kanan (lihat perenggan 35 & 37).

(4) GSR hanya roda gigi sebagai TPR kanan. Ini adalah tiadak adil bagi Jabatan Peguam Negara dan pegawai-pegawainya untuk mencadangkan bahawa GSR sendiri mempunyai kawalan mutlak ke atas pendakwaan pemohon dan dapat memanipulasi pelaksanaan kes pendakwaan agar sesuai dengan agendanya ketika pasukan pendakwaan terdiri daripada TPR lain dan tindakan am prosiding jenayah adalah di bawah bidang kuasa pendakwa raya dan pegawai-pegawainya (lihat perenggan 38).

(5) Pada akhirnya, mahkamah perlu memastikan bahawa pemohon diberikan hak perlembagaannya untuk perbicaraan yang adil. Hakim memegang keseimbangan antara pihak-pihak yang mempunyai pertikaian dan menjadi kewajiban mahkamah untuk memastikan bahawa perbicaraan dilakukan dengan adil demi kepentingan keadilan (lihat perenggan 39).]

Cases referred to

Dato' Sri Mohd Najib bin Hj Abdul Razak v Pendakwa Raya [2019] MLJU 529; [2019]1 LNS 1837, CA (refd)
MG v R [2007] NSWCCA 57, SC (refd)
Muhammad Shafee bin Md Abdullah v PP [2019] MLJU 755; [2019] 1 LNS 844, HC (refd)

Legislation referred to

Criminal Procedure Code s 376
Federal Constitution art 145(3)
Legal Professions (Practise and Etiquette) Rules 1978 r 28(1)

Shafee Abdullah (Nur Syahirah Hanapiah with him) (Shafee & Co) for the applicant.
Ahmad Akram Gharib (Mohamad Mustaffa P Kunyalam, Rozaliana Zakaria, Nadia Zulkefli and Nur Syakirin Yaccob with him) (Attorney General's Chambers) for the respondent.

Mohamed Zaini Mazlan J:

INTRODUCTION

[1] The applicant sought to declare that Datuk Seri Gopal Sri Ram's ('GSR') appointment as a senior deputy public prosecutor under s 376(3) of the Criminal Procedure Code, conflicted with his practise as an advocate and solicitor of the High Court of Malaya and that he had displayed bias and mala fide by having preconceived and predetermined notions of the applicant's guilt even before he was charged in court.

[2] Consequential to these declarations, the applicant seeks to have GSR disqualified from continuing to act as a senior deputy public prosecutor, or act on behalf of the public prosecutor in five cases involving him in the Kuala Lumpur High Court.

FACTS

[3] The applicant was the nation's sixth Prime Minister. His tenure ended after the 14th General Election in 2018. He then faced several criminal charges. He claimed that these were the outcome of a political conspiracy by his political rivals in the new government. The cases are ongoing, save for one which had been recently concluded. His grievance lies with GSR's appointment as the senior deputy public prosecutor for the ongoing cases (Case Nos WA-45–7–11 of 2018, WA-45–8–11 of 2018, WA-45–10–12 of 2018, WA-45–6–02 of 2019, WA-45–1–04 of 2019 and WA-45–12–10 of 2019).

[4] GSR (he was formerly a judge of the Federal Court. He retired in February 2010), an advocate and solicitor, was appointed as a senior deputy public prosecutor by the former attorney general, Tan Sri Tommy Thomas ('TT') (he served as the attorney general from 2018 to 2020). He was assigned to take conduct of the prosecution against personalities allegedly involved in the fraudulent deals of the 1Malaysia Development Bhd group of companies. The applicant was one of them. GSR's appointment was made known publicly through amongst others, the former attorney general's media release. The Attorney General's Chambers had also executed a letter of appointment to give effect to the appointment.

[5] GSR had since taken conduct of some of the cases against the applicant, assisted by deputy public prosecutors from the Attorney General's Chambers, and the Malaysian-Anti Corruption Commission.

THE APPLICATION

[6] The two main grievances of the applicant were that GSR had been involved in the investigation process of the cases against the applicant and that he had already adjudged the applicant's guilt, which is evident from the discussions that GSR had with TT's predecessor, Tan Sri Mohamed Apandi Ali ('MAA') (he was the attorney general from 27 July 2015 to 4 June 2018. He was also formerly a judge in the Federal Court. He retired in 2015).

The investigation allegation

[7] The applicant referred to several factors to substantiate his allegation. The first was the media release released by the Attorney General's Chambers dated 31 August 2018, when TT was the attorney general. The relevant excerpt is as follows:

> 5. It is public knowledge that investigation papers (IPs) into the numerous fraudulent deals connected to the 1MDB affair have not been submitted to Chambers by the MACC and the police (save for one IP concerning Jho Low, which resulted in charges and the issue of warrants of arrest against him and his father last week). Upon receipt of the IPs from the investigating agencies, this office is required to study them, prepare charges and prosecute the alleged accused at trial. In order to spearhead this entire process, I am pleased to announce the appointment of Datuk Seri Gopal Sri Ram as Senior Deputy Public Prosecutor pursuant to Section 376(3) of the CPC.
>
> 6. Datuk Seri Sri Ram, a retired Federal Court Judge, has returned to active practise. He has substantial experience in criminal law matters. His strong and determined personality will no doubt enhance *the investigation* and prosecution in all matters pertaining to the 1MOB scandal. (Emphasis added.)

[8] The second was GSR's letter of appointment from the Attorney General's Chambers dated 30 August 2018. The relevant excerpt of that letter is as follows:

> Re: 1MOB Prosecution
>
> In the exercise of my discretion under Section 376(3) of the Criminal Procedure Code, I am pleased to appoint you as Senior Deputy Public Prosecutor *to spearhead the investigation* of numerous fraudulent deals connected with the affairs of 1 Malaysia Development Berhad ('1MOB') Group of companies and the prosecution of the principal personalities responsible for such massive fraud. Your services would include:
>
> a) Working with the relevant Investigation Agencies with a *view of urgently securing Investigation Papers ('IPs') from them;*
>
> b) Studying all IPs that will be submitted by the various Investigating Agencies to Chambers;
>
> c) Drafting criminal charges;
>
> d) Prosecuting the accused in Court; and
>
> e) Attending to post trial tasks, such as the preparation of written submissions, until delivery of decision by the court. (Emphasis added.)

[9] The applicant in alluding to the media statement and letter of appointment, forcefully contended that there is a clear case of conflict of interest, as GSR had been appointed to both investigate and prosecute the cases against him. It was highlighted that the roles of a public and deputy public prosecutor are set out in the Federal Constitution and the Criminal Procedure Code and that none of these roles allows them to be involved in the

investigation process. The applicant alleged that GSR had been actively engaged in directing and supervising the investigation undertaken by the relevant authorities, and contended that GSR's involvement in the investigation process conflicted with his role as a prosecutor in the cases against him. The applicant also contended that GSR could therefore be a potential witness and that this would run foul of r 28(1) of the Legal Professions (Practise and Etiquette) Rules 1978, which prohibits an advocate and solicitor from appearing in a case where he could be a witness.

[10] The respondent submitted that the applicant's allegation was not novel, as this was not his first attempt to disqualify GSR as the senior deputy public prosecutor based on the same reason. The first application, vide Criminal Application No WA-44–211–12 of 2018, which was pursued up to the Federal Court, had failed. The applicant had also filed a judicial review application vide Application No WA-25–377–12 of 2018 at the High Court, seeking to nullify GSR's appointment. That application too had been dismissed by the High Court.

[11] The respondent also highlighted that the applicant's counsel, Tan Sri Shafee Abdullah, who is also facing a criminal charge, had made a similar application to disqualify GSR as the senior deputy public prosecutor in his case, relying on the same ground. That application was heard by Justice Collin Lawrence Sequerah and had also been dismissed (the judgment is reported in *Muhammad Shafee bin Md Abdullah v Public Prosecutor* [2019] MLJU 755; [2019] 1 LNS 844 (HC)).

[12] All these courts concluded that there was no evidence to prove that GSR had been involved in the investigation process against the applicant. The respondent submitted that the regurgitation of this issue amounts to an abuse of the court's process.

That GSR is bias

[13] GSR had met up with MAA at the latter's house sometime in January 2018. MAA was still the serving attorney general then. MAA revealed his version of what transpired in the meeting through a posting on his Facebook (a social networking website) on 10 June 2020. GSR did not come alone. He was accompanied by another lawyer named Tey Jun Ren@JR Tey MAA's spouse, Puan Sri Faridah Begum, was also present in this meeting. These facts are not disputed. Both MAA and his wife had also affirmed an affidavit to relate their version of the meeting. GSR however had his version.

[14] MAA claimed that GSR had initially attempted to persuade him to unfreeze a client's bank account, to enable GSR to be paid his fees. MAA

claimed that he was not persuaded. MAA then claimed that GSR revealed that he had a bigger agenda to discuss, as he was sent by Tun Dr Mahathir Mohamed (Malaysia's fourth and seventh Prime Minister) ('Tun Mahathir') to see him.

[15] According to MAA, GSR told him that Tun Mahathir wanted the applicant arrested the next day and that arrangements have been made with the police, and for a magistrate to issue a remand order. GSR then told him that the public had been unhappy and frustrated and that he would make them happy by arresting the applicant. GSR had also allegedly attempted to cajole MAA further by stating that the arrest would be heroic, as he would be the first attorney general to arrest a sitting Prime Minister.

[16] MAA had before this meeting, cleared the applicant from any wrongdoings, after considering the investigation papers submitted by the Malaysian Anti-Corruption Commission. This was in January 2016. The decision not to take any action against the applicant was conveyed through the Attorney General's Chamber's media release. It was therefore public knowledge.

[17] The respondent responded through GSR's affidavit. GSR claimed to have visited MAA in a professional capacity, and that he had rendered advise which is legally privileged. He denied MAA's version, save for having advised MAA to arrest the applicant, as there was sufficient evidence in the public domain. GSR reproduced the WhatsApp (a multi-platform messaging application that is commonly used in mobile phones) conversation between him and MAA, that he claimed would shed light on what had transpired. MAA confirmed the veracity of the WhatsApp transcript. The relevant transcript of the WhatsApp conversation is as follows:

> [12/05/2018, 5:20:48PM] Apandi Ali Judge: Bro.. Have I been sacked as AG? I just saw on a news portal. Officially I am in the dark. Thank you.
>
> [12/05/2018, 5:22:12PM] Sri Ram: I have heard nothing. Must be fake news. *You know Tun M. It is not his style*.
>
> [12/05/2018, 5:24:42PM] Apandi Ali Judge: thank you Bro ... anything do let me know. I am much obliged.
>
> [12/05/2018, 5:25:04PM] Sri Ram: Not a problem Brother.
>
> [12/05/2018, 5:26:41PM] Apandi Ali Judge: Tiada Peguam Negara buat masa ini! — Tun M http://www.mstar.com.mylberita/semasa/2018/05/12/tiada-peguam-negara/#RM5CddYPmmsECT4h.41
>
> [12/05/2018, 5:26:59PM] Apandi Ali Judge: That's the news Bro ...
>
> [12/05/2018, 5:28:50PM] Sri Ram: Brother, this has all the features of fake news.
>
> [12/05/2018, 5:29:56PM] Apandi Ali Judge: I hope so. Even the Palace is unaware.

[12/05/2018, 5:33:40PM] Sri Ram: Brother just carry on and do your job. Don't be distracted.

I really wish you had followed my advice and charged that criminal Najib. Anyway he and his wife are certain to face the music

[12/05/2018, 5:37:12PM] Apandi Ali Judge: I just acted based on the contents of the investigation Papers as submitted by the relevant agencies ... the records are all there.

[12/05/2018, 5:38:29PM] Sri Ram: *I know. But the fact that monies found in his account alone was sufficient to charge him.*

[12/05/2018, 5:45:53PM] Apandi Ali Judge: that is in respect of the 2.6 which was investigated by MACC, of which the (sic) were sufficient explanation that satisfied the investigation agency. MACC came out twice with press statements exculpating him ...

[12/05/2018, 7:09:37PM] Sri Ram: *Yes. But a prosecutor is not concerned with the defence version. All he needs is prima facie evidence of a crime. Once that is made out it is for the accused to give his explanation to the Court. Though MACC may purport to clear a suspect it is for the Public Prosecutor to charge if the statements of the A witnesses show a case. The statements of B witnesses do not matter to determine whether there is a prima facie case*.

That is my humble opinion ... (Emphasis by the applicant.)

[18] MAA referred to the WhatsApp conversation in his affidavit-in-reply. He claimed to have been surprised with GSR's contention that the fact that monies were found in the applicant's bank account was sufficient to charge him. MAA opined that GSR's approach was unreasonable, particularly as he was formerly a judge of the Federal Court and currently an eminent counsel, as there was a myriad of factors that a prosecutor would need to carefully consider before charging anyone. He took great exception to GSR's views in the last message posted, and averred that 'I have never heard of such a jaundiced view from the mouth of such purportedly an experienced person'. MAA did not reply to GSR's last message and concluded that GSR was clearly biased and had an agenda towards the applicant.

[19] The applicant contended that it was evident from the meet up between MAA and GSR that the latter had the intention to have him arrested and prosecuted, and that he had from the onset been bias towards him. The applicant dismissed GSR's version of the meetup and alleged that his averments were merely hearsay and uncorroborated. It was pointed out that GSR had gone to MAA's house with another lawyer named JR Tey, and it was therefore incumbent on him to get JR Tey to affirm an affidavit to corroborate his version. This is in contrast to MAA, whose version was corroborated by his wife's affidavit. It was submitted that GSR's affidavit should be deemed inconsequential without JR Tey's corroboration.

[20] The applicant contended that GSR had displayed biasness against him even before he was roped in to lead the prosecution's team. The applicant alluded to GSR's attempt to persuade MAA during the meeting and the WhatsApp content between the two to support this point. That GSR had alluded to the applicant as 'Criminal Najib' lends credence to the applicant's belief of GSR's lack of detachment and biasness. These traits, the applicant contended, are not the qualities expected of a prosecutor, which are fair-minded, impartial and objective. The applicant is as such doubtful that he will be tried fairly.

[21] The applicant surmised that GSR's biasness against him would lead the public into concluding that justice was not being done and that he would be denied a right to a fair trial, as he was being prosecuted by a prosecutor that had shown an overwhelming biasness towards him.

[22] The respondent argued that the applicant's hypothesis on the meeting and WhatsApp messages between MAA and GSR are far-fetched, as the applicant was still the sitting Prime Minister then, and MAA the attorney general, compared to GSR who was merely a legal practitioner, and Tun Mahathir a former Prime Minister. It was contended that it was illogical for GSR to instruct MAA, the attorney general, to arrest the applicant on the instructions of a veteran politician. The applicant had only ceased being the Prime Minister after the general elections in May 2018. That being the case, GSR could not have foreseen the fall of the applicant, let alone him being charged and GSR being appointed as a senior deputy public prosecutor.

[23] As for the WhatsApp conversation, the respondent submitted that the conversation must be read as a whole and not in parts. The tone of the conversation suggests that GSR was merely consoling MAA, whom he deemed as a close friend and a former colleague in the Federal Court, upon learning of his untimely departure as an attorney general with the change of government. The respondent argued that the views that GSR had expressed regarding the applicant were merely his personal views. The respondent alleged that it was MAA who had demonstrated an apparent biasness towards the applicant, as the fact shows that the applicant was subsequently charged over several offences when MAA had refused to do so when the was the attorney general.

FINDINGS

That GSR was involved in the investigation

[24] The powers of the public prosecutor are indeed wide, but not without limits. Their powers and jurisdiction in respect of the control and direction of criminal proceedings are succinctly set out under art 145(3) of the Federal

Constitution, and s 376 of the Criminal Procedure Code. It would be quite inaccurate to state that prosecutors are not involved at all in the investigation process, but what has been widely misunderstood is the extent of their involvement. Their role at the investigative stage is merely to direct the relevant investigating authorities to conduct further investigations if the need arises. It is incumbent on them to ensure that there is sufficient evidence for them to analyse, and subsequently decide whether to institute criminal proceedings or otherwise. Prosecutors however do not and should not partake in the actual investigation process, lest they become partial to the outcome. The criminal justice system requires a separation of duties between those who investigate and those who prosecute. Prosecutors should not be persecutors.

[25] This issue has indeed been ventilated and decided in the first application until its conclusion in the apex court, and also before Justice Sequerah. The applicant is now attempting to ventilate the same argument here, not in the same breath but most certainly in the same flavour.

[26] The applicant had in the first application relied on the media release by TT, and his interview to a few news agencies. TT in the interview was even quoted to have said that GSR was involved in the final stages of investigations. The Court of Appeal's judgment on this issue in the first application is instructive (*Dato' Sri Mohd Najib bin Hj Abdul Razak v Pendakwa Raya* [2019] MLJU 529; [2019]1 LNS 1837 (CA)). The appellate court took the view that the statements do not prove that GSR had been involved in the investigative process. The court elaborated on the distinct investigative duties of the relevant authorities, and the prosecutorial duties of the prosecution (at para 73). In gist, the relevant authority entrusted to investigate will upon completing their task submit the investigation papers to the prosecutors. It is for the prosecutors to then determine whether to charge the person investigated. The prosecutors however are empowered to direct the investigating officers to do further investigations, if some matters would need further evidence. That is all, as the prosecutors do not take part in the investigations. The Court of Appeal held that TT's statement of GSR's involvement with the investigation process was merely in a supervisory role accustomed to prosecutors. The appellate court also held that the applicant's allegations were bare assertions and that there were no materials before the court to support his allegations.

[27] Similarly, Justice Sequerah too held the same view and found the allegations unsubstantiated. Unlike the first application, His Lordship had to deal with GSR's letter of appointment, which states that GSR was to have conduct and supervision over the investigation process. His Lordship concluded that GSR could not have been involved in the investigative process

as the applicant had been investigated by the Malaysian Anti-Corruption Commission in 2015, where else GSR was only appointed in August 2018 (paras 133–139).

[28] I am mindful of the fact that the statements by TT and the contents of GSR's letter of appointment state that GSR is to be involved in the investigations. It was perhaps a poor choice of words, and in hindsight could have been drafted or said better. What is pertinent however is to show that the intent, if at all that was the case, was acted upon. GSR has denied being involved in the investigation process. I find no reason to doubt his denial, as there is no convincing evidence proffered by the applicant to suggest otherwise. The applicant must produce the evidence to substantiate his allegations, and not merely hurl accusations based on perceptions. I, therefore, find the applicant's allegation that GSR had been involved in the investigations against him unmeritorious. There is no cogent evidence to support the applicant's allegation, and it remains purely hypothetical. This issue had in any event been canvassed by the applicant in the previous applications highlighted by the respondent. It is a moot point. It has been deliberated and decided. The decisions held by the other courts should remain. This issue should not be regurgitated again.

The allegation of biasness

[29] The applicant seemed to have heavily relied on MAA's version of the meeting between him and GSR to prove GSR's preconceived view on the applicant's guilt. He also sought to rely on the WhatsApp conversation between MAA and GSR to drive home this point, particularly on GSR referring to him as the 'Criminal Najib'. The applicant highlighted that the AG's chambers had only decided to charge him after further investigations were conducted and that this was done after MAA had resigned as the attorney general. The applicant contended that GSR was biased towards him, as he had already prejudged his guilt before he was even charged. The applicant is quite simply put, convinced that GSR has an agenda against him.

[30] The applicant sought to rely on the Australian case of *MG v R* [2007] NSWCCA 57. This case makes for an interesting read, as the court discussed at great length the standards expected of prosecutors in handling criminal trials. The applicant was tried for allegedly participating in a series of brutal sexual assaults on the victim over a lengthy period. This case had generated much public interest and discourse, as the victim was raped twenty-five times by fourteen men over six hours. It was one of Sydney's worst gang rape cases.

[31] The applicant had sought for several orders, but the one that concerns this case is his application to restrain the Crown Prosecutor, Ms Cunneen, from

further representing the Crown in the proceedings against him, and that another prosecutor is appointed in her stead. Ms Cunneen had made some public statements about the case, which demonstrated her considerable sympathy for the victim and frustration towards what she perceived to be a criminal justice system that weighed favourably towards the accused persons. In considering the applicant's application, the court was of the view that the test is whether:

> ... a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration ofjustice, including the appearance of justice (at para 73).

[32] The court unanimously held that Ms Cunneen's public statements had compromised her capacity to prosecute the case against the applicant fairly, as it demonstrated a lack of detachment from the case that she was required to prosecute. The applicant's application to have Ms Cunneen be replaced as Crown Prosecutor for his case was allowed.

[33] The applicant opined that the impact of GSR's appointment as the senior deputy public prosecutor was more serious compared to Ms Cunneen's case, as he had already prejudged the applicant's guilt.

[34] I will first address the applicant's contention to put little value on GSR's version of events in his affidavits, as unlike MAA, who had his wife to support his version with her affidavit, GSR did not have JR Tey's affidavit to support his version, as they came together. I do not think that GSR needed to have his averments corroborated by JR Tey. Quantity does not make for veracity. It would suffice for the versions put by parties in their affidavits to be analysed with the circumstances of the case.

[35] I have done so, and am of the opinion that the applicant's apprehension of GSR's views and biasness is untenable. GSR like any other person is entitled to have his personal opinion. It remains just that. It would have been a different consideration if he had demonstrated his biasness when carrying out his duty as a senior deputy public prosecutor. His personal opinion does not impinge on his duties as a prosecutor. He, like any other person, is entitled to form his own opinion, provided that his view is not made public, for that would then set forth the test of whether it would lead to a fair minded reasonably informed person to conclude that the prosecution would be directed to vindicating his personal view. It is perfectly reasonable to hold a personal view. The crucial test is whether he was openly biased when acting as a senior deputy public prosecutor.

[36] The court in *MG v R* had emphasised that it would have been fine for Ms Cunneen to hold the view complained of in private, but it became an issue when her view was made publicly. The pertinent segments of the judgment are as follows:

> There are further matters. By speaking publicly as she did Ms Cunneen revealed here considerable sympathy for the complainant in her ordeal. *That Ms Cunneen, or any person. should hold those views is understandable*. However, by *publicly expressing them*, and at the same time mounting an argument that the criminal justice system was both weighted inappropriately in favour of accused persons and imposed unacceptable burdens on complainants, Ms Cunneen discarded the prosecutor's obligation of detachment. (para 92)
>
> ...
>
> *The statements which Ms Cunneen made have a number of consequences. They demonstrate a lack of detachment from the case she was required to prosecute. There is no difficulty in Ms Cunneen privately holding the view that the applicant is quality. However, her public expression of that view displayed partiality and potentially compromised her capacity to prosecute on behalf of the Crown. It had the consequence that a fair minded person might reasonably conclude that her conduct of the prosecution would be directed to vindicating her publicly expressed view. When a prosecutor on a public occasion expresses the view that a person is guilty, although they have not been tried according to law, the latter prosecution of that person by that prosecutor tends toward oppression which is the antithesis of a fair trial.* (para 86) (Emphasis added.)

[37] In any event, the meeting between MAA and GSR and the WhatsApp conversation took place well before GSR was appointed as the senior deputy public prosecutor. That was his views then. It was moreover a private conversation. The applicant's application would have more force if these events had taken place after GSR had been appointed.

[38] Prosecutors are not representatives of the complainants or victims. They represent the state, namely the interest of the public, and is entrusted to assist the court by presenting an unbiased presentation of the facts and evidence, untrammelled with fear or favour. GSR is merely a cog in the wheel as a senior deputy public prosecutor. It would be a great disservice to the Attorney General's Chambers and its officers to suggest that GSR alone have absolute control over the prosecution of the applicant and could manipulate the conduct of the prosecution's case to fit his agenda, more so when the prosecution's team consists of other deputy public prosecutors. The general conduct of the criminal proceedings would still be under the purview of the public prosecutor and his officers.

CONCLUSION

[39] I agree with the respondent's contention that it is ultimately for the courts to ensure that the applicant is afforded his constitutional rights to a fair

trial. This brings to mind the eminent Lord Denning's remark in his book 'The Family Story' (published 28 December 1981 by *Lexis Law Publishing* (VA)) where he stated, 'Someone must be trusted. Let it be the judges'. A judge's role in an adversarial system such as ours is to hold a balance between the parties in dispute. It is ultimately the court's bounden duty to ensure that a trial is conducted fairly in the interests of justice. The court will ultimately come to the aid of any party that was treated unfairly, if it ever comes to that.

[40] I find the grounds submitted by the applicant unmeritorious. The applicant's application is therefore dismissed.

Application dismissed.

Reported by Ashok Kumar